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October 17, 2023

The Honorable Tracy Stone-Manning
Director, Bureau of Land Management
U.S. Department of Interior
1849 C Street, NW
Washington, D.C. 20240

Dear Director Stone-Manning:

We write to request your assistance in clarifying how and why the Bureau of Land Management (BLM) is interpreting provisions of the Aquifer Recharge Flexibility Act in Idaho in complete conflict with the Congressional intent of the law. The Idaho Water Resources Board (IWRB) currently conducts state-sponsored aquifer recharge on the Eastern Snake Plain Aquifer in accordance with the Idaho State Water Plan and the Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan. The IWRB contracts with irrigation entities to transport water rights owned by the IWRB through irrigation canals for the purpose of passive aquifer recharge both in off-canal recharge basins and through in-canal seepage.

Many of the irrigation canals with which the IWRB contracts cross BLM lands. The irrigation entities who operate these canals have existing rights-of-way with the BLM for their canal systems. In 2020, the Aquifer Recharge Flexibility Act (hereafter referred to as "the Act") was passed by Congress. As authors and proponents of the legislation, we can attest it was to facilitate the use of these irrigation canals for aquifer recharge purposes by allowing the canals to be used for the conveyance of aquifer recharge water without the need to seek additional easement authorizations from BLM. The Act provides, in pertinent part:

Conveyance for Aquifer Recharge Purposes— *The holder of a right-of-way, easement, permit, or other authorization to transport water across public land administered by the Bureau of Land Management may transport water for aquifer recharge purposes without requiring additional authorization from the Secretary where the use does not expand or modify the operation of the right-of-way, easement, permit or other authorization across public land.*
[Sec. 1105(c)(3).]

In 2021, the IWRB sought two new state-based water right permits for aquifer recharge. The water right applications were protested by the BLM on the basis that the IWRB did not have authorization to put the water rights to use in existing irrigation canals unless the Board obtained a separate right-of-way authorization over and above the rights-of-way already held by irrigation entities.

The IWRB raised the Act as a solution to the BLM protest, arguing that the Act allowed it to use irrigation canals for which a right-of-way already existed. Under the IWRB's existing contracts with local irrigation entities, irrigation entities that hold BLM rights-of-way agree to transport the IWRB's recharge water through their irrigation canals. The IWRB argued that the plain language of the Act allowed the "holder of the right of way" (here the irrigation entity) to transport "water" (here a water right owned by the IWRB) "for the purposes of aquifer recharge" (here the aquifer recharge water being transported into the aquifer either through in-canal seepage or through transport to off-canal recharge basins.) The IWRB argued that nothing in the statute precludes a "holder of a right-of-way" from "transport[ing] water for aquifer recharge purposes" that is owned by another entity.

It is our understanding that the BLM does not interpret the Act as applying to the IWRB. BLM takes the position that the Act does not provide benefits to third parties who wish to use someone else's right-of-way for their own aquifer recharge purposes and that the Act does not apply to any entity or person that is not the holder of the existing right-of-way. The BLM further interprets the term "water" as meaning only those water rights owned by the holder of the right-of-way; such that the only water rights that may be "transport[ed] for aquifer recharge purposes" under the terms of the Act are those recharge water rights owned by the right-of-way holder itself.

It is also our understanding that the BLM focused on the word "transport" and interpreted it to mean only moving water from Point A to Point B is covered by the Act. In other words, any in-canal recharge, where the purpose is to let recharge water seep through the canal, itself is not covered by the Act.

The BLM's current interpretation of the Act precludes the IWRB from using existing rights of way for aquifer recharge purposes. Further, it goes against the spirit of the plain language of the Act, which was clearly intended to allow for the IWRB to utilize these existing rights of way to recharge the Eastern Snake River Plain Aquifer in the most efficient manner possible. We had these situations in mind when the Act was enacted, and this interpretation severely limits the ability of aquifer recharge to be an effective water conservation tool not only in Idaho, but in states across the West who may look to follow Idaho's example. We would like to work with you to correct the implementation of the Act and allow for this important drought mitigation tool to work as best possible across the West.

Thank you for your attention to this request and we await your response.

Sincerely,



JAMES E. RISCH
United States Senator



MIKE CRAPO
United States Senator



MIKE SIMPSON
Member of Congress



RUSS FULCHER
Member of Congress